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# In the Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

*v.*

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

*v.*

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. 158(e) and (f), expressly permit private employers to implement agreements requiring all contractors performing work on a construction project to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. The question presented is:

Whether the doctrine of implied preemption under the NLRA prohibits a state agency, acting in its proprietary capacity, from implementing such an agreement for a state public works construction project.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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### INTEREST OF THE UNITED STATES

The First Circuit in this case held that the doctrine of implied preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, precludes the state agency responsible for construction of the Boston Harbor clean-up project from exercising a proprietary right that Congress expressly conferred on private employers in Sections 8(e) and 8(f) of the Act, 29 U.S.C. 158(e) and (f)—namely, the right to require all contractors working on a construc-

tion project to adhere to a collective bargaining agreement with a union. If affirmed by this Court, this decision would threaten the validity of master labor agreements that have been utilized by federal, state and local governments for the construction of a wide variety of public projects. In addition, the National Labor Relations Board has a strong interest in the preemptive effect of the Act it administers.

## STATEMENT

1. The Massachusetts Water Resources Authority (MWRA) provides water and sewage services for the eastern half of the Commonwealth. Following a lawsuit arising out of the discharge of sewage into Boston Harbor in violation of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, MWRA was ordered by the federal district court to meet a detailed timetable for cleaning up the Harbor. This task will require the expenditure of $6 billion for public works over a ten-year period. See *United States* v. *Metropolitan District Comm'n*, 757 F. Supp. 121, 123 (D. Mass.), aff'd, 930 F.2d 132 (1st Cir. 1991); J.A. 71. The legal framework for carrying out the project is set forth in MWRA's enabling statute, 1984 Mass. Acts 372, and the Commonwealth's public bidding laws. Mass. Gen. Laws ch. 149, §§ 44A-44L (1989); *id.* ch. 30, § 39M (1989 & Supp. 1990); see Pet. App. 3a.[1] Pursuant to those laws, MWRA furnishes the funds for construction (assisted by state and federal grants), owns the facilities to be built, establishes bid conditions, and makes all contract awards. Pet. App. 3a, 74a.

2. In April 1988, MWRA retained Kaiser Engineers, Inc. (Kaiser), a private construction contractor, as its program/construction manager. An important function of Kaiser was to advise MWRA about how to maintain labor-management peace for the duration of the project.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 91-274.

MWRA had already experienced work stoppages and informational picketing at various sites. MWRA was concerned that, because of the scale of the project and the number of different craft skills involved, it was vulnerable to numerous delays, which would jeopardize compliance with the court-ordered schedule, subject MWRA to contempt sanctions and cost overruns, and prolong the environmental harm. These concerns were heightened by the limited access to the major work site, Deer Island, which would enable a small number of pickets to stop the entire project. Pet. App. 3a-4a, 74a-75a; J.A. 71-76, 77-78, 80-82.

Aware of these concerns, Kaiser recommended to MWRA that it be permitted to negotiate with the 34 unions in the building and construction trades, through the Building and Construction Trades Council (Council), in an effort to arrive at an agreement that would assure labor stability over the life of the project. MWRA's staff accepted Kaiser's recommendation, but with the understanding that any agreement would be subject to final approval by MWRA. Pet. App. 75a, 105a; J.A. 76-77, 82-83. On May 22, 1989, Kaiser and the unions reached agreement on the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the Master Labor Agreement). See Pet. App. 107a-140a.

The Master Labor Agreement states that it is the policy of MWRA that "the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." Pet. App. 109a. It requires all contractors to recognize the Council as the bargaining representative for all craft employees on the project, to hire workers through the hiring halls of the Council's constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the Council's wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the Council unions'

benefit funds. In return, the unions agree not to engage in any strikes or work stoppages during the ten-year life of the project. *Id.* at 5a-6a, 32a, 75a. The Agreement affords a number of other advantages to MWRA as well, including standardization of working hours, travel pay, and other working conditions for all construction employees, and procedures for prompt resolution of labor disputes that could disrupt the project. J.A. 77.

On May 28, 1989, MWRA's Board of Directors approved the Master Labor Agreement. To implement that decision, the Board also ordered that Bid Specification 13.1 be added to the specifications applicable to all new construction work. Pet. App. 5a, 75a.[2] Bid Specification 13.1 provides in pertinent part:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the [Master Labor Agreement] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the Building and Construction Trades Council * * * and will be bound by the provisions of that agreement in the same manner as any other provision of the contract * * *.

*Id.* at 141a-142a. Although successful bidders are thus required to abide by the Master Labor Agreement, any qualified bidder may compete for a contract, without regard to whether the bidder has a pre-existing bargaining relationship with a union, and the contract must be awarded to the lowest qualified bidder. *Id.* at 141a; see also *id.* at 103a, 112a. Moreover, nonunion bidders are not required to sign any other agreement with any unions for other projects. And although a contractor must agree to use the local union's job referral system for project

[2] Massachusetts law requires MWRA, as well as other procuring agencies, to award contracts pursuant to a competitive bidding process. See page 2, *supra*; Pet. App. 3a; *Modern Continental Constr. Co.* v. *Lowell*, 465 N.E.2d 1173 (Mass. 1984).

labor, the system must be operated in a non-discriminatory manner, so that employees who are not already union members are nevertheless eligible for project work. *Id.* at 103a-104a, 110a, 116a-117a.

3. On March 5, 1990, respondent Associated Builders and Contractors of Massachusetts/Rhode Island (ABC)—an association of nonunion contractors—filed this suit seeking an injunction barring enforcement of Bid Specification 13.1 on the ground that it impermissibly interferes with the system of free collective bargaining contemplated by the National Labor Relations Act (NLRA). The district court rejected ABC's preemption claim and denied a preliminary injunction. Pet. App. 72a-83a.[3]

In the meantime, another contractors' association had filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that Kaiser's Master Labor Agreement with the Council violates the NLRA. On June 25, 1990, the NLRB's General Counsel declined to issue a complaint. He found (i) that the Agreement is a valid prehire agreement under Section 8(f) of the NLRA, 29 U.S.C. 158(f), which authorizes such agreements in the construction industry, and (ii) that its provisions limiting work on the project to contractors who agree to abide by the Agreement is lawful under the construction-industry proviso to Section 8(e), 29 U.S.C. 158(e), which carves out an exception to Section 8(e)'s prohibition against "hot cargo" agreements that require an employer to refrain from doing business with any other person. *Building & Trades Council (Kaiser Engineers, Inc.)*, Case 1-CE-71, GC Advice Memo (Pet. App. 88a-93a).

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[3] Respondents also contended that Bid Specification 13.1 is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, and violates the Fourteenth Amendment, Section 1 of the Sherman Act, 15 U.S.C. 1, and the constitution and laws of Massachusetts. The district court rejected those claims as well, Pet. App. 77a-81a, but the court of appeals did not reach them, *id.* at 30a.

4. On October 24, 1990, a panel of the First Circuit reversed the district court's decision, agreeing with respondents' contention that MWRA's Bid Specification 13.1 is preempted by the NLRA. Pet. App. 49a-71a. On rehearing en banc, the court of appeals, by a 3-2 vote, adhered to that ruling. Id. at 1a-48a.

The en banc majority believed that "the present case is most heavily influenced by the Supreme Court's holdings in the *Golden State Transit Corp* cases,[4] which relied and expanded upon the *Machinists* doctrine."[5] Pet. App. 15a. It understood "the lesson of the *Golden State* cases [to be] that, where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." *Id.* at 30a. The majority concluded that Bid Specification 13.1, by requiring all contractors to comply with the Agreement negotiated by Kaiser, constitutes direct interference with the collective bargaining process. *Id.* at 17a. The majority recognized that Sections 8(e) and 8(f) of the NLRA permit such contractual arrangements in the construction industry, Pet. App. 22a-24a, and that, under those statutory provisions, "the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." *Id.* at 24a. But it found the legality of the Agreement itself to be "irrelevant" to the question whether Bid Specification 13.1—by which MWRA implements the Agreement—is preempted. *Id.* at 24a-25a.

Chief Judge Breyer dissented in an opinion joined by Judge Campbell. Pet. App. 32a-45a. Chief Judge Breyer believed that the "only question in this case is whether the NLRA forbids the MWRA, because it is a state agency, to do what the Act explicitly permits a private contractor to do." *Id.* at 32a. In his view, MWRA's con-

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[4] See *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*).

[5] See *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

tracting decision affects labor-management relations "only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized." *Id.* at 34a.

## SUMMARY OF ARGUMENT

A. Sections 8(e) and 8(f) of the National Labor Relations Act specifically authorize employers and unions in the construction industry to enter into a "prehire" agreement that establishes wages and other working conditions on a construction project, recognizes the union as the exclusive bargaining agent of employees on the project, and requires all contractors and subcontractors on the project to comply with the agreement. Those Sections thus carve out an exception to the NLRA's usual proscriptions against recognition of and bargaining with a union that has not yet established its majority status, and against "hot cargo" agreements that obligate the employer to refrain from or cease doing business with another person. The majority and dissenters in the First Circuit agreed that the Master Labor Agreement between Kaiser and the Council is lawful under Sections 8(e) and 8(f). The only question is whether MWRA acted unlawfully in adopting Bid Specification 13.1 to implement that Agreement.

B. The NLRA does not prevent a private developer of property from implementing a project labor agreement such as that at issue here. The majority below erred in holding that the NLRA treats state and local governments differently by uniquely prohibiting them from doing the same thing.

1. In invalidating Bid Specification 13.1, the First Circuit relied upon the branch of the implied preemption doctrine known as "*Machinists* preemption." See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). That branch bars state regulation of private conduct that is neither arguably prohibited nor arguably protected by the NLRA, but is instead left to the free play of economic forces. The question under *Machinists* is whether the State has entered into the bar-

gaining process "to an extent Congress has not countenanced." *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608, 616 (1986). The *Machinists* rationale is inapplicable here. First, Congress has not eschewed regulation of prehire agreements; they are regulated by the NLRA itself. Second, the Agreement between Kaiser and the Council is fully consistent with Sections 8(e) and 8(f). And third, by conditioning its purchase of construction services upon the very sort of labor agreement that Congress explicitly authorized, MWRA "does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." Pet. App. 35a (Breyer, C.J., dissenting). *Wisconsin Dep't of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), does not render the proprietary nature of MWRA's actions irrelevant. The only purpose of the state statute in *Gould* was to enforce the NLRA; it was not "a legitimate response to state procurement constraints or to local economic needs." *Id.* at 291. This case, by contrast, is a direct response to such considerations.

2. The majority below found it significant that the construction-industry exceptions in Sections 8(e) and 8(f) apply only to an "employer," which the NLRA defines to exclude a State and its political subdivisions. However, the fact that the NLRA affirmatively authorizes project labor agreements cuts strongly against finding that MWRA acted unlawfully by adopting a bid specification that implements such an agreement. The exceptions in Sections 8(e) and 8(f) apply only to an "employer" because the list of prohibited practices likewise applies only to an "employer." It would be perverse to hold that the effect of Congress's exclusion of States from those prohibitions—out of deference to state autonomy—is to afford the States *less* freedom to order their own construction contracting practices than the Act affords private employers and developers of property.

The background of Sections 8(e) and 8(f) confirms this conclusion. When Congress enacted those provisions in 1959, it intended to preserve the pattern of collective

bargaining in the construction industry. It therefore is significant that the extensive legislative record of the 1959 amendments shows that the pattern of collective bargaining at the time (including use of project labor agreements) was the same for public works as it was for purely private projects. Moreover, the special circumstances in the construction industry that led Congress to permit prehire agreements are the same whether it is a public or private owner of property that lets the contracts for the work.

## ARGUMENT

### THE NATIONAL LABOR RELATIONS ACT DOES NOT IMPLIEDLY PREEMPT A STATE AGENCY FROM IMPLEMENTING A COLLECTIVE BARGAINING AGREEMENT THAT ESTABLISHES LABOR TERMS AND UNION RECOGNITION FOR A STATE CONSTRUCTION PROJECT

Sections 8(e) and 8(f) of the National Labor Relations Act expressly permit private employers to require all contractors performing work on a construction project to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. The issue here is whether the doctrine of implied preemption under the NLRA nevertheless prohibits a state agency, acting in its proprietary capacity, from implementing such an agreement for a state construction project. In our view, the First Circuit erred in holding that state action to effectuate a lawful project labor agreement is barred by the NLRA.[6]

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[6] The courts of appeals have divided on this question in various contexts. Compare *Glenwood Bridge, Inc.* v. *City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991) (following decision below), with *Phoenix Engineering, Inc.* v. *M-K Ferguson of Oak Ridge Co.*, No. 91-5527 (6th Cir. June 11, 1992) (discussed at note 13, *infra*), and *Associated Builders & Contractors* v. *City of Seward*, No. 91-35511 (9th Cir. June 5, 1992) (discussed at note 17, *infra*).

### A. The Master Labor Agreement Between Kaiser Engineers And The Building And Construction Trades Council Is Authorized By Sections 8(e) And 8(f) Of The Act

1. Bid Specification 13.1 was adopted by the Massachusetts Water Resources Authority to implement the Master Labor Agreement that was entered into between Kaiser Engineers and the Building and Construction Trades Council. The Agreement prescribes wages and other working conditions for the Boston Harbor project, recognizes the Council as the exclusive bargaining representative of employees working on the project, and requires all contractors and subcontractors on the project to comply with the Agreement. See pages 3-4, *supra*. Because state law requires MWRA, rather than Kaiser, to award contracts for work on the project and to do so after competitive bidding (see MWRA Pet. 18 & n.8; note 2, *supra*), the Master Labor Agreement between Kaiser and the Council, standing alone, would not have assured that all successful bidders would be bound by the Agreement. Accordingly, Bid Specification 13.1 provides that each successful bidder and all subcontractors, as a condition of being awarded a contract, will agree to abide by the Agreement between Kaiser and the Council. Pet. App. 141a-142a.

Collective bargaining agreements such as the Master Labor Agreement in this case are specifically authorized in the construction industry by Sections 8(e) and 8(f) of the NLRA. Those provisions were enacted in 1959,[7] in response to the special conditions that Congress found, after extensive study, to be present in the construction industry. See *NLRB* v. *International Ass'n of Bridge & Iron Workers*, 434 U.S. 335, 348-349 (1978).

a. Employees in the construction industry are not typically attached to a single employer for a long period of time; they instead work for various contractors or

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[7] Pub. L. No. 86-257, §§ 704(b), 705(a), 73 Stat. 543-544, 545.

subcontractors on a series of projects, staying with any one for only the brief period when their particular skills are required. Consequently, " '[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . [a union's] majority status due to the short periods of actual employment by specific employers.' " *Iron Workers*, 434 U.S. at 349 (quoting S. Rep. No. 187, 86th Cong., 1st Sess. 55 (1959)) (second brackets added). It therefore became customary in the construction industry for employers to enter into a collective-bargaining agreement with unions to govern work on projects to be undertaken in a particular geographic area during an upcoming period, even though the unions had not demonstrated majority status on a particular job—and even though, in many instances, the jobs to which the agreement would apply had not even been started when it was entered into.

When Congress amended the NLRA in 1959, it concluded that such "prehire" agreements, in addition to furnishing protection and union representation for covered employees, are " 'necessary for the employer to know his labor costs before making the estimate upon which his bid will be based,' " and for the employer to " 'be able to have available a supply of skilled craftsmen ready for quick referral.' " *Iron Workers*, 434 U.S. at 348 (quoting H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959)); see also *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-266 (1983). Section 8(f) preserves these advantages by authorizing employers and unions in the building and construction industry to continue to negotiate prehire agreements, thereby carving out for that industry an exception to the NLRA's proscriptions against recognition of and bargaining with unions that have not yet established their majority status.[8] See *Jim McNeff, Inc.*, 461 U.S. at

[8] It is an unfair labor practice for an employer under Section 8(a)(1) and (2) of the Act, 29 U.S.C. 158(a)(1) and (2), and for a union under Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), to interfere with, restrain, or coerce employees in the exercise of their right (protected by Section 7, 29 U.S.C. 157) to select their repre-

265-266; S. Rep. No. 187, *supra*, at 27-29, 55-56. To protect employee free choice, however, Section 8(f) contains a final proviso that permits employees, once hired, to utilize the NLRB election process under Sections 9(c) and 9(e) of the Act, 29 U.S.C. 159(c) and (e), if they wish to reject the bargaining representative or cancel the union security provisions of the prehire agreement. See *Iron Workers*, 434 U.S. at 345; Pet. App. 24a.

b. Negotiation of a prehire agreement under Section 8(f) would not assure adherence to the contractually specified wages and other conditions of employment at the work site if the employer could avoid those standards by subcontracting project work to an employer who is not a party to the agreement. Subcontracting in fact is the usual practice in the construction industry, and workers "are organized in employment pools to be hired out either by the contractor with whom they have an agreement or by a subcontractor to whom the work is assigned." *Donald Schriver, Inc.* v. *NLRB*, 635 F.2d 859, 880 (D.C. Cir. 1980), cert. denied, 451 U.S. 976 (1981).

To address this problem, Congress in 1959 also enacted the "construction industry proviso" to Section 8(e)'s prohibition against "hot cargo" agreements that require an employer to refrain from doing business with another person. The proviso approves clauses in collective bargaining agreements that require all work on a construction site to be performed by contractors who are bound to honor the applicable area-wide agreement with the appropriate union. Congress thereby preserved the means that employers and unions in the construction industry had adopted for ensuring not only that labor relations on particular jobsites are harmonious, but also that the

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sentative. "The Court has held that both union and employer commit unfair practices when they sign a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *Iron Workers*, 434 U.S. at 344; see *International Ladies' Garment Workers Union* v. *NLRB*, 366 U.S. 731, 737 (1961).

workers may have the opportunity for terms of employment enjoyed by employees in more stable industries. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 654-660, 661-662 (1982).

2. Operating together, Sections 8(e) and 8(f) validate "project labor agreements" in the construction industry—collective bargaining agreements that establish labor terms and union recognition for a construction project as a whole, and that require all contractors and subcontractors who are subsequently engaged to work on the project to agree to be bound by the agreement. Accordingly, both the majority and dissenting judges below acknowledged that the Master Labor Agreement between Kaiser and the Council "is a valid labor contract." Pet. App. 24a; see also *id.* at 32a, 34a-35a (Breyer, C.J., dissenting). The majority below likewise did not dispute the dissenters' conclusion that there would have been no impermissible distortion of the economic forces that Congress expected to govern labor relations in the construction industry if the Agreement had been approved and implemented by a *private* owner or developer of property, acting in conjunction with its general contractor. See *id.* at 34a-35a (Breyer, C.J., dissenting). They disagreed, however, on whether it makes a difference that in this case it was a state agency (MWRA) that authorized negotiation of the Agreement by Kaiser and then approved the Agreement and effectuated it by requiring contractors and subcontractors to adhere to its terms as a condition of performing work on the project. *Id.* at 27a-28a, 35a, 40a-41a. As we shall now explain, the majority erred in holding that the NLRA impliedly prohibits MWRA from implementing the Master Labor Agreement through Bid Specification 13.1.

### B. Bid Specification 13.1, By Which MWRA Implements The Master Labor Agreement Between Kaiser And The Council, Is Not Preempted By The NLRA

The First Circuit held that the NLRA treats state and local governments differently from all other employers—and all other owners and developers of property—by uniquely prohibiting them from implementing the very sort of project labor agreement that is expressly authorized by Sections 8(e) and 8(f) of the Act. The court found that result required even where, as here, the responsible governmental entity has concluded that the agreement would further important interests in promoting labor peace, controlling costs, assuring a readily available source of labor, and meeting mandatory deadlines in the construction of a major public works project that has been found necessary to remedy serious violations of federal law and concomitant environmental harms.

Principles of federalism counsel that an Act of Congress should not be construed to single out state and local governments for special regulatory burdens when they act in a proprietary capacity (and in a manner that is fully consistent with federal law), absent an explicit statement of congressional intent to that effect. Cf. *New York* v. *United States*, No. 91-543 (June 19, 1992), slip op. 12-13; *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2403 (1991). Yet the court of appeals pointed to nothing—and there is nothing—in the text or legislative history of the NLRA that suggests a congressional intent to intrude so drastically and uniquely into state and local affairs. Rather, the court relied on the doctrine of implied preemption that has been developed under the NLRA. The underpinnings of that doctrine, however, do not support the court of appeals' ruling, and the text, background, and purposes of the relevant provisions of the NLRA in fact weigh strongly against an extension of the doctrine that would invalidate Bid Specification 13.1.

### 1. *The Doctrine of Implied Preemption Under The NLRA Does Not Apply To Bid Specification 13.1*

a. In finding MWRA's Bid Specification 13.1 preempted by the NLRA, the court of appeals relied principally upon the branch of the implied preemption doctrine known as "*Machinists* preemption," and on the application of that doctrine in this Court's decisions in the *Golden State* cases. See notes 4 & 5, *supra*.[9] This Court has explained that the *Machinists* doctrine is designed "to govern preemption questions that arose concerning activity that was neither arguably protected * * * nor arguably prohibited" by the specific terms of the NLRA. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985). Under the *Machinists* doctrine, a court must determine if a State's regulation of conduct nonetheless conflicts with Congress's intention that certain labor-related conduct remain "unregulated" and left to "'the free play of economic forces.'" *Machinists*, 427 U.S. at 140 (quoting *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971)); see also *Golden State I*, 475 U.S. at 614.[10]

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[9] In *Machinists*, the Court held that the NLRA preempted the authority of a state labor relations board to enjoin a union and its members from refusing to work overtime in order to put economic pressure on the employer in negotiations for renewal of a collective bargaining agreement. See also *Teamsters* v. *Morton*, 377 U.S. 252 (1964) (holding state court preempted from awarding damages for peaceful secondary activity that was neither protected by Section 7 nor prohibited by Section 8 and that Congress did not prescribe when it enacted Section 303 of the Labor-Management Relations Act, 29 U.S.C. 187); but see *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519 (1979) (rejecting *Machinists* preemption challenge to state law providing for payment of unemployment benefits to striking workers); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 751-758 (1985) (rejecting *Machinists* challenge to state law requiring minimum mental health-care benefits); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 19-22 (1987) (rejecting *Machinists* challenge to state law requiring severance payments to employees affected by plant closing if no collective bargaining agreement required such payments).

[10] The *Machinists* doctrine is distinct from the other major branch of NLRA preemption doctrine—*Garmon* preemption—which applies

In *Golden State I*, the Court held that the city's action in conditioning renewal of the company's taxicab operating license on the company's settlement of its labor dispute with the union by a certain date was preempted by the NLRA. The Court reasoned that the city had "[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced" by setting "time limits on negotiations [and] economic struggle." 475 U.S. at 616 (quoting *Machinists*, 427 U.S. at 149). In *Golden State II*, the Court held that the company was entitled to sue for compensatory damages under 42 U.S.C. 1983, because the city's action in violating the company's "right to use permissible economic tactics to withstand the strike" deprived it of "a personal liberty" guaranteed by federal law. 493 U.S. at 112; see also *id.* at 109.[11]

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to state regulation of conduct that is either arguably protected or arguably prohibited by the NLRA's specific regulatory terms. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Metropolitan Life*, 471 U.S. at 748-751 (describing "two distinct NLRA pre-emption principles"). *Garmon* preemption "protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA," *Metropolitan Life*, 471 U.S. at 748, and to prescribe the appropriate remedy for a violation, *Garmon*, 359 U.S. at 247.

Although relying primarily on the *Machinists* doctrine, the majority below expressed the view that the *Garmon* preemption doctrine also "most likely applies to Specification 13.1." Pet. App. 30a; see also *id.* at 15a, 21a. The only explanation for that view was an assertion that the Master Labor Agreement's provision for union recognition interferes with employee rights under Section 7. Pet. App. 21a. However, as we have explained at pages 11-12, *supra*, Section 8(f) specifically sanctions prehire agreements in the construction industry and protects the employees' freedom of choice by different means—by permitting them to file a petition for a representation election during the term of the agreement. Indeed, the NLRB's General Counsel dismissed an unfair labor practice complaint challenging the lawfulness of the Agreement between Kaiser and the Council under the NLRA. Pet. App. 88a-93a.

[11] The Court explained in *Golden State II* (475 U.S. at 112):

> The *Machinists* rule is not designed—as is the *Garmon* rule [see note 10, *supra*]—to answer the question whether state or federal regulations should apply to certain conduct. Ratner, it

b. The majority below read the *Golden State* cases as establishing an absolute rule that "where interference into the collective bargaining process by the State is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." Pet. App. 30a. The *Golden State* decisions, however, do not announce any such absolute rule of preemption. Rather, the test under *Golden State* is whether the State has "entered into the bargaining process to *an extent Congress has not countenanced.*" *Golden State I*, 475 U.S. at 616 (emphasis added) (quoting *Machinists*, 427 U.S. at 149). Thus, the *Golden State* decisions require inquiry into whether the particular state action conflicts with an intention by Congress to leave the specific conduct involved to the free play of economic forces. In *Golden State* itself, for example, the city, by requiring that the company settle its labor dispute with the union by a certain date, clearly intruded upon private conduct that Congress had intended to be unregulated in furtherance of the national labor policy of encouraging private settlement of labor disputes (and of allowing resort to economic weapons for that purpose).[12]

By contrast, the state action at issue here does not cause any impermissible interference with federal labor policy. First, Congress chose not to leave unregulated the use of project labor agreements in the construction industry. That subject is regulated by the NLRA itself, which specifically approves such agreements, subject to certain conditions. As a result, the usual predicate for *Machinists* preemption—a federal statutory policy to leave the conduct in question unregulated—is lacking. See *Phoenix Engineering, Inc.* v. *M-K Ferguson of Oak*

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is more akin to a rule that denies either [the federal or state] sovereign the authority to abridge a personal liberty.

[12] Similarly, in *Machinists*, the State, by barring the union from inducing employees to refuse to work overtime in order to put economic pressure on the employer, deprived the union of an economic weapon that the NLRA neither prohibited nor protected, but left the union free to utilize.

*Ridge Co.*, No. 91-5527 (6th Cir. June 11, 1992), slip op. 21-23.[13] Second, the Master Labor Agreement between Kaiser and the Council that is implemented by Bid Specification 13.1 is fully consistent with Sections 8(e) and 8(f) of the NLRA. There accordingly can be no claim of an actual conflict between state and federal law. See note 14, *infra*. Third, in adopting Bid Specification 13.1, MWRA was not acting in the capacity of a regulator of private conduct, as the state or local government was in *Machinists* and the *Golden State* cases; MWRA was acting in a proprietary capacity—as a market participant—by specifying the conditions under which it will enter into contracts with private parties. See *Phoenix Engineering*, slip op. 24; Pet. App. 44a (Breyer, C.J., dissenting); cf. *Associated Builders & Contractors, Inc.* v. *City of Seward*, No. 91-35511 (9th Cir. June 5, 1992), slip op. 6321-6322.

c. The majority below found it irrelevant that MWRA was acting in a proprietary rather than a regulatory capacity, believing that *Wisconsin Dep't of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986), requires rejection of that distinction. Pet. App. 25a-30a. *Gould* held that a

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[13] In *Phoenix Engineering*, the Sixth Circuit rejected the claim that the NLRA prohibited a private general contractor retained by the U.S. Department of Energy (DOE) from entering into a project labor agreement with the Building Trades Council for construction services at DOE's nuclear facility at Oak Ridge, Tennessee. In the Sixth Circuit's view, "[t]he *Golden State* cases * * * seem to hold that *Machinists* preemption prevents regulation, either by a state or the federal government, of aspects of labor-management relations left unregulated by the NLRA." Slip op. 18. Noting the detailed regulation of prehire agreements in Section 8(f), the court concluded that the "Project Labor Agreement is an example of a labor practice that Congress closely regulated and *Machinists* preemption does not apply." Slip op. 23.

The government argued in *Phoenix Engineering* (Br. at 28-35) that the *Machinists* doctrine, which governs preemption of state laws that might affect the system of free collective bargaining under the NLRA, was not applicable to the actions of a federal agency, and that the statutes and implementing regulations governing construction of DOE facilities in any event rendered the project labor agreement in that case lawful.

Wisconsin statute debarring repeat violators of the NLRA from doing business with the State was preempted by the NLRA. In rejecting the contention that the State's action was permissible because it was acting as a purchaser of services, the Court acknowledged that "[n]othing in the NLRA * * * prevents private purchasers from boycotting labor law violators," but added that "[t]he Act treats state action differently * * * because in our system States simply are different from private parties and have a different role to play." 475 U.S. at 290.

*Gould*, however, is wholly different from this case. The state debarment rule in *Gould* "serve[d] plainly as a means of enforcing the NLRA," and "[n]o other purpose could credibly be ascribed" to it. 475 U.S. at 287. Here, by contrast, MWRA is not seeking to enforce the NLRA, punish NLRA violators, or further any regulatory role. It seeks only to protect its *own* proprietary interests in the stable and efficient development of a major governmental project, and it does so as any private developer or general contractor might—through arrangements relating to a lawful project labor agreement. Indeed, the project labor agreement at issue here actually was negotiated and entered into by Kaiser Engineers, the private construction manager that MWRA selected.

*Gould* does not hold that where, as here, the State is seeking to further its legitimate proprietary concerns by implementing a contractual arrangement that is expressly authorized by the NLRA, its action nevertheless is preempted. To the contrary, the Court noted in *Gould* that it was "not saying that state purchasing decisions may never be influenced by labor considerations," and that it was "not faced [t]here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." 475 U.S. at 291.[14] This case, by contrast, directly

[14] We do not contend, of course, that a State's actions are automatically insulated from preemption under the NLRA whenever it

involves "state procurement restraints" and "local economic needs," and therefore presents the question left open by *Gould*. See *Phoenix Engineering*, slip op. 23-24.[15]

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acts as a purchaser of services or other market participant. While "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market," *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 437 (1980), "[w]hat the Commerce Clause would permit States to do in the absence of the NLRA is * * * an entirely different question from what States may do with the Act in place." *Gould*, 475 U.S. at 290. As the Court added in *Gould*, "we cannot believe that Congress intended to allow States to interfere with the 'interrelated federal scheme of law, remedy, and administration' * * * under the NLRA as long as they did so through exercises of the spending power." *Id.* at 290 (quoting *Garmon*, 359 U.S. at 243); see also *Brown* v. *Hotel Employees Union Local 54*, 468 U.S. 491, 501 (1984) ("If employee conduct is protected under [Section] 7 [of the NLRA], then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.").

Accordingly, a State could not require that an employer negotiate or be bound by a prehire agreement with a union as a condition of obtaining a state contract outside the construction industry, because, except in that industry, such an agreement would abridge the Section 7 right of employees to select a representative of their own choosing, or to refrain from having a union representative altogether. Moreover, although prehire agreements are permissible with respect to construction projects, a State could not deny employees, once hired, the right guaranteed by the final proviso to Section 8(f) to petition the Board for an election to reject or change the union representative, or to cancel the union security provisions of the agreement. See page 12, *supra*. Here, however, MWRA's action, which is confined to a single construction project, is fully consistent with Section 8(f) (as well as Section 8(e)).

[15] Moreover, as the Sixth Circuit pointed out in *Phoenix Engineering*, "*Gould* implicated *Garmon*, and not *Machinists*, preemption." Slip op. 24; see 475 U.S. at 286-289. It is one thing to conclude, as the Court did in *Gould*, that under *Garmon* and its progeny, a State cannot, merely by invoking its spending power, interfere with the statutory procedures and remedies for violations of the NLRA that are committed by that Act to the primary jurisdiction of the NLRB. See note 10, *supra*. It would be quite another to invoke that reasoning to its fullest extent in establishing the contours of the *Machinists* doctrine, which is not premised on

d. The regulation and approval of prehire agreements provided by Sections 8(e) and 8(f) refute the notion that the state action challenged here deprived prospective contractors on the Boston Harbor project of a right, protected by the NLRA, "to negotiate their own terms of employment or to operate on a non-union basis." Br. in Opp. 4; Pet. App. 18a, 21a. Although employers in other industries may have that right, the construction industry proviso to Section 8(e) limits both the legal right and practical ability of contractors and subcontractors in that industry to order their own labor relations: by virtue of the proviso, a general contractor may require all other employers working on a particular jobsite to adhere to the terms of a project labor agreement it has entered into with union representatives. See *Woelke & Romero*, 456 U.S. at 663; *Jim McNeff, Inc.*, 461 U.S. at 270 n.9.

Accordingly, the nonunion contractors that are members of respondent Associated Builders and Contractors plainly would have had no right protected by the NLRA to obtain work on a nonunion basis at the Boston Harbor project if that project had been privately owned, if the owner had retained Kaiser as its general contractor, and if Kaiser, in turn, had entered into a project labor agreement identical to the one challenged here. It follows that MWRA is trenching on no "right" or "liberty" (*Golden State II*, 493 U.S. at 109, 112) accorded by the NLRA to nonunion (or other) contractors by requiring them, as a condition of obtaining work on the project, to abide by

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preserving the primary jurisdiction of the NLRB. Under the *Machinists* doctrine, Congress has, by hypothesis, chosen to leave resolution of certain matters to the "free play of economic forces." 427 U.S. at 140. Those forces necessarily are played out in the market context in which the employer and its customers, competitors, and employees operate, and in light of the purchasing and other market decisions they make. The federal, state, and local governments are major market participants in many industries, and the conditions on which they choose to purchase therefore are, in general, simply one set of factors in the "free play of economic forces." See also page 29, *infra*.

the Master Labor Agreement that Kaiser entered into with the Council. Since "[t]here is no inalienable right to work as a non-union contractor on publicly funded jobs," we, like the Sixth Circuit in *Phoenix Engineering*, "do[] not see why the *Machinists* doctrine should be extended to protect third parties who are free to accept the bid conditions or look for other work." Slip op. 20-21.

In short, by conditioning the purchase of construction services for its own project "upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, [MWRA] does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." Pet. App. 35a (Breyer, C.J., dissenting).

***2. The Text, Background, And Purposes Of The Relevant Provisions Of The NLRA Cut Strongly Against Extension Of The Implied Preemption Doctrine To Invalidate Bid Specification 13.1***

a. The majority below acknowledged that "under the exceptions established by Sections 8(e) and 8(f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." Pet. App. 24a. But it found that conclusion to be "irrelevant to the preemption issue at hand," because the "history of Sections 8(e) and 8(f) discusses private employers only," and nowhere "is there any indication that a state would be allowed to impose this type of regulation." Pet. App. 24a-25a. The majority also believed that "Congress is perfectly capable of distinguishing between states and private parties when it chooses, and it has so chosen here," since Sections 8(e) and 8(f) refer to an "employer," and Section 2(2) of the Act, 29 U.S.C. 152(2), excludes from the definition of that term "any State or political subdivision thereof." Pet. App. 27a. The majority misapprehended the significance of these statutory provisions.

The fact that Sections 8(e) and 8(f) of the NLRA specifically deem a project labor agreement such as that between Kaiser and the Council to be lawful cuts power-

fully *against* the conclusion that MWRA acted unlawfully under the NLRA when it adopted a bid specification that effectuates the Kaiser-Council Agreement by requiring all contractors and subcontractors on the Boston Harbor project to adhere to its terms. Moreover, as Chief Judge Breyer pointed out in dissent, "Congress had two perfectly good reasons for not making the construction-industry exceptions explicitly applicable to states, and neither of these reasons suggests any pre-emptive intent." Pet. App. 41a. First, "the list of forbidden practices, to which the exceptions apply, itself applies only to an 'employer,' defined to exclude 'any State,' thereby leaving the regulation of labor relations between a state and its own employees primarily to state law"; accordingly, a "drafter, writing a statutory exception to the resulting prohibition, would not normally extend its scope beyond those subject to the prohibition in the first place." *Ibid.*[16] Second, when Congress enacted the construction industry exceptions in 1959, it "had little reason to believe that a court might find, hidden in the silence of the Act, some other relevant prohibition applicable to a state." *Ibid.*

The majority below also drew the wrong lesson from the exclusion of the States and their political subdivisions from the definition of the term "employer" in Section 2(2) of the Act. As a result of that exclusion, the NLRA "leaves regulation of the labor relations of state and local governments to the States." *Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 223 (1977). The purpose of the exclusion was to preserve the autonomy of state and local governments in matters that might otherwise fall under the NLRA. It would be perverse to conclude that the result of Congress's decision not to include States within the ambit of the Act (and therefore within the exceptions in Sections 8(e) and 8(f)) is to afford the States *less*

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[16] Cf. *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 690 (1992) ("a proviso can only operate within the reach of the principal provision it modifies").

freedom to order their own construction contracting practices than the Act affords to private employers and developers of property. As the Ninth Circuit recently observed, "[i]n light of Section 2(2), we fail to see how Congress could have intended to prohibit a public employer from agreeing to a work preservation clause to which a private employer is free to agree." *Associated Builders & Contractors, Inc.* v. *City of Seward*, slip op. 6325.[17]

b. The background of Sections 8(e) and 8(f) confirms that the NLRA does not impliedly preempt the use of project labor agreements on construction projects undertaken by a governmental agency, whether federal, state, or local. This Court has concluded that, when Congress enacted those provisions in 1959, it intended to preserve the "'*status quo*'"—the then-existing "pattern of collective bargaining in the construction industry." *Woelke & Romero*, 456 U.S. at 657 (quoting *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 637 (1967)); see also *Connell Constr. Co.* v. *Plumbers & Steamfitters Union Local No. 100*, 421 U.S. 616, 628-629 (1975); H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959); 105 Cong. Rec. 17,899-17,900 (1959) (remarks of Sen. Kennedy). The Court accordingly has

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[17] In *Seward*, the union that represented the city's own electric utility employees, in order to protect those employees' interests, entered into an agreement with the city limiting the contracting of work on a renovation project to contractors who agreed to enter into a labor agreement with the union. In holding that the city's action was not barred under *Golden State*, the Ninth Circuit distinguished the instant case on the ground that "[t]he MWRA in *Boston Harbor* did not act out of its concerns as a public employer; unlike the City of Seward, it did not employ workers who had traditionally performed the work that would be contracted out." Slip op. 6325-6326. We do not believe this distinction is significant. Governmental employers typically hire private contractors for large public works projects; they do not maintain a force of employees for that contingency. To limit a governmental entity's right to make proprietary decisions consistent with the NLRA's construction industry provisions only where that choice impacts on employees on its payroll would effectively deny it that choice in most cases.

found it appropriate, in order to determine the legality of contractual relationships in the construction industry, to "examin[e] Congress' perceptions regarding the status quo in the construction industry." *Woelke & Romero*, 456 U.S. at 657; see *id.* at 657-660. Following the same analytical approach here, it is significant that in the extensive legislative record developed during the decade prior to enactment of the 1959 amendments,[18] the pattern of collective bargaining that was described for construction of public works (*e.g.*, dams, roadways, and bridges), undertaken both by the United States and by state and local governments, was no different from that for private projects.

For example, in *Woelke & Romero* the Court relied (456 U.S. at 658-659 & n.11) on the discussion in the 1959 hearings of *Associated General Contractors of America, Inc. (St. Maurice, Helmkamp & Musser)*, 119 N.L.R.B. 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local Union No. 3* v. *NLRB*, 266 F.2d 905 (D.C. Cir.), cert. denied, 361 U.S. 834 (1959). That case involved a union agreement governing construction work on Travis Air Force Base pursuant to a contract with the Army Corps of Engineers. 119 N.L.R.B. at 1027, 1049; 266 F.2d at 906.[19] The Court in *Woelke & Romero* also cited (456 U.S. at 662 n.13) the explanatory memorandum prepared by Representatives Thompson and Udall (see 105 Cong. Rec. 15,538-15,543

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[18] The problem of accommodating the provisions of the NLRA to the special circumstances of the construction industry was the subject of intensive congressional review, commencing in 1951 and culminating in the 1959 amendments. This history is summarized in the dissenting opinion below. Pet. App. 37a-40a.

[19] As the Court pointed out in *Woelke & Romero*, 456 U.S. at 659 n.11, the court of appeals' opinion in *Operating Engineers* was placed in the record of the 1959 House Hearings, and employer and union representatives referred to the case in their testimony. See *Labor-Management Reform Legislation: Hearings on H.R. 3540, etc., Before a Joint Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 801, 803-807, 2364, 2367 (1959).

(1959)), which stated that "the building trades unions and contractors follow the practice of working out a scale of wages and other terms of employment which will be applicable to all projects within a specified geographical area for a substantial period of time," and "[t]his practice has been encouraged by the Atomic Energy Commission and other Government agencies." *Id.* at 15,541.[20]

The hearing record in prior years likewise established that the use of project labor agreements was part of the pattern of collective bargaining on public as well as private construction projects. Thus, in 1953, a representative of a California general contractors' association testified before the Senate Committee:

> The essential nature of the construction industry requires that contractors negotiate labor agreements before hiring workmen. * * * [C]ontractors must have [legislative relief] because of the practical operational conditions under which millions of dollars of Federal and State and local competitive-bidding jobs are carried on.

*Taft-Hartley Act Revisions: Hearings Before the Senate Comm. on Labor and Public Welfare*, 83d Cong., 1st Sess. 1302 (1953) (testimony of Gardiner Johnson). The President of the Building and Construction Trades Department of the AFL-CIO noted that, by virtue of a project labor agreement, an Atomic Energy Commission plant had been completed without "1 minute lost by industrial strife of any kind." *Id.* at 1672 (Richard J. Gray). And another industry representative explained that contractors

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[20] See also *Labor-Management Reform Legislation: Hearings on S. 505, etc., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 495 (1959) (testimony of Richard J. Gray, President of Building and Construction Trades Department, AFL-CIO, quoting S. Rep. No. 1509, 82d Cong., 2d Sess. 3-4 (1952)) (the "U.S. Government * * * is directly concerned in the proper pricing and completion of construction projects for defense installations and production facilities," and prehire agreements are important for "large projects, particularly for defense installations and plants").

and unions frequently negotiated project labor agreements to build plants for federal agencies, including the Corps of Engineers, Department of the Navy, and General Services Administration. *Id.* at 1343 (J.J. O'Donnell). There was similar testimony in connection with a precursor bill that passed the Senate in 1952. See 98 Cong. Rec. 5028-5029 (1952); S. Rep. No. 1509, *supra*, at 3-4.[21]

As this Court has repeatedly stressed, "[t]he purpose of Congress is the ultimate touchstone" in resolving pre-emption questions under the NLRA. *Metropolitan Life*, 471 U.S. at 747 (quoting *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978)). Here, the purpose of Congress in enacting Sections 8(e) and 8(f) in 1959 was to preserve the pattern of collective bargaining in the construction industry. Because that pattern included the use of project labor agreements on public as well as private projects, the purpose of Congress in amending the

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[21] The Senate Subcommittee was informed that project labor agreements had been successfully employed for construction of a powerhouse on the Skagit River pursuant to a contract let by the Seattle Department of Public Works, and for construction of the McNary Dam in Oregon and Pine Flat Dam in California pursuant to contracts with the Army Corps of Engineers. *To Amend the National Labor Relations Act, 1947, With Respect to the Building and Construction Industry: Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 175-176 (1951) (Gardiner Johnson) (*1951 Hearings*). In addition, James J. Reynolds, Jr., the NLRB's then-acting chairman, filed a memorandum that brought to the Subcommittee's attention a number of construction industry cases that had recently come before the Board. Those cases involved such projects as construction of the Hanford, Washington, nuclear research facility for the Atomic Energy Commission (see *Guy F. Atkinson & J.A. Jones Constr. Co.*, 84 N.L.R.B. 88 (1949)), the Keswick Dam in California for the Department of the Interior (see *W.B. Willett Co.*, 85 N.L.R.B. 761 (1949)), the Brooklyn-Battery Tunnel for the New York City Tunnel Authority (see *Compressed Air, Local Union No. 147*, 93 N.L.R.B. 1646 (1951)), and a hospital in Kansas City, Missouri, for the Veterans Administration (see *Del E. Webb Construction Co.*, 95 N.L.R.B. 75 (1951)). *1951 Hearings* at 87, 97, 103, 105.

NLRA in 1959 requires rejection of respondents' argument that the NLRA, as so amended, nevertheless impliedly preempts MWRA from implementing the Master Labor Agreement for the Boston Harbor public works project. That is especially so since there is no affirmative indication in the background of those amendments that Congress intended to preserve the status quo only on projects undertaken by private developers, and at the same time to outlaw project labor agreements on government projects or prohibit government agencies from implementing such agreements in the manner MWRA did here. Because the relevant substantive restrictions in the NLRA applied only to employers in the private sector, all that was necessary to preserve the status quo in the construction industry was to include exceptions to those restrictions. It is for this reason that the exceptions in Sections 8(e) and 8(f) likewise are directed only to employers in the private sector.

c. The circumstances in the construction industry that caused Congress to authorize prehire contracts—the short duration of employment, the practice of employees' working for many employers, and the contractors' need to estimate costs in advance and to have available a steady supply of labor (see page 11, *supra*)—are present whether it is a public agency or a private party that lets the contracts for the work. This similarity makes it most unlikely that Congress, without saying so, intended to deny to the States and their political subdivisions, when acting in a proprietary capacity, the potential benefits of agreements that it expressly authorized in Sections 8(e) and 8(f).

As a result, the view of the majority below would produce arbitrary distinctions in prehire practices within the construction industry. Whether there is a prehire agreement covering an entire project "would often reflect, not size of the project, or desire of the parties, or special conditions of the industry, but simply whether or not the entity letting the contracts is an arm of the state or private." Pet. App. 40a-41a (Breyer, C.J., dis-

senting). And even among state projects, "the presence or absence of such an agreement would depend upon whether state law permits the state in question to hire a private general contractor (who, then, presumably, would be free to enter into a prehire agrement) or, as in Massachusetts, requires the state agency to sign the relevant contracts itself." *Ibid.*

Project labor agreements have been used for many years on a wide variety of public projects, including defense installations, nuclear facilities, hospitals, tunnels, airports, convention centers, hydroelectric projects, waste treatment facilities, and mass transit systems.[22] Governmental agencies responsible for those projects, and the private contractors who perform the work, have formed the judgment that such agreements may sometimes help to ensure labor peace and stability, an available labor supply, and timely completion of major construction projects that further substantial public purposes. The undertaking of public works projects is a central function of state and local governments. Such projects therefore "implicate 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred," *Gould*, 475 U.S. at 291 (quoting *Garmon*, 359 U.S. at 243-244)—where, as here, the labor agreement applicable to the project in question is fully consistent with federal law.

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[22] See U.S. Dep't of Labor, Labor-Mgmt. Services Admin., *The Bargaining Structure in Construction: Problems and Prospects* 12, 14 (1980); D. Mills, *Industrial Relations & Manpower in Construction* 40 (1972); pages 25-27, *supra*; Council Pet. 12-13 & n.5; Pet. 12; California, *et al.*, Amicus Br. 2-3 n.1.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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